Supreme Court, U.S.
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No. 92-692

In The

Supreme Court of the United States

October Term, 1992

E. D. SHELLEDY,

Petitioner,

v.

EDWARD LORE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION OF RESPONDENT SALT LAKE COUNTY

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QUESTIONS PRESENTED

Does a grantee by quit claim deed have standing to assert the tax immunity of the grantor United States to void a tax deed when the statute of limitations is raised as a defense.

Did Utah infringe upon the federal government's power to manage and dispose of its property by finding the government's grantee lacked standing to assert the immunity of the United States to void a tax deed when the state four year statute of limitations is raised as a defense.

Does a tax deed which is voidable due to jurisdictional defects in the proceedings pass good title when the four year statute of limitations has run.

LIST OF PARTIES

The parties to the proceedings below were the petitioner E. D. Shelledy and the respondents Edward Lore, Alan Parsons, Erin Parsons, Roy Hockin, Harry Deckered, Kent C. Bangerter, Lloyd V. McBride, David E. Kunz and Susan S. Kunz, individuals, Merit Distributing, Inc., a Utah corporation, State Tax Commission of the State of Utah, and Salt Lake County.

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION OF RESPONDENT SALT LAKE COUNTY

The respondent Salt Lake County respectfully requests this Court deny the petition for writ of certiorari seeking review of the Utah Supreme Court's opinion in this case. The opinion is reported at 836 P.2d 786 (Utah 1992).

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at 836 P.2d 786 (Utah 1992). The Order denying the timely petition for rehearing is reprinted in the Appendix to the Petition, p. C1. The Order of the trial court of the Third

District Court in and for Salt Lake County, State of Utah (Sawaya, District Judge), was not reported. It is reprinted in the Appendix to the Petition, p. B1.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on April 14, 1992, affirming the decision of the lower court dated January 17, 1990. The Utah Supreme Court denied a timely petition for rehearing on July 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

Utah Code Ann. § 78-12-5.2 provides in pertinent part:

> *Holder of tax title – Limitations of action or defense – Proviso.* No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchaser thereof at any public or private tax sale and after the expiration of one year from the date of this act.

Utah Code Ann. § 78-12-5.3 provides in pertinent part:

Definitions of "tax title" and "action."

(1) the term "tax title" as used in § 78-12-5.1 and § 59-2-1364, and the related amended §§ 78-12-5, 78-12-7, and 78-12-12, means any title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance, or transfer of property in the course of a statutory proceeding for the liquidation of any tax levied against the property whereby the property is relieved from a tax lien.

STATEMENT OF THE CASE

Salt Lake County incorporates the statement of facts set forth in the opinion of the Utah Supreme Court and adds that the transfer from the Small Business Administration to Petitioner was by quit claim deed.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because it is not of sufficient import to warrant further consideration. An unanimous court gave full consideration to the issues and decided them correctly when it held the Petitioner did not have standing to assert the sovereign immunity of the United States in a quiet title action when the statute of limitations has been raised as a defense. The Petitioner purchased property from the SBA while on notice of a rival tax deed and that the time in which to challenge the tax deed had run.

Further, the Petitioner was treated fairly in the state court proceedings. He was granted a lien against the property for the amount of taxes which he paid plus interest. The United States hasn't been injured. The quit claim deed is evidence it received valuable consideration and has not been deprived of its ability to manage and dispose of its property. The Court correctly applied the law in that the United States is not the real party in interest and only Petitioner will benefit from the setting side of the tax deed.

Finally, balanced against Petitioner's interest is the state policy behind the statute of limitations on tax deeds, which is to give increased stability to tax titles and thereby augment the revenues of state and local governments.

I.

THE UTAH SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND DECISIONS OF THE HIGHEST COURTS OF OTHER STATES.

A. IN THE CONTEXT OF THE FACTS, THE DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The general rule is the statute of limitations does not run against the United States with respect to the disposition of the public domain or public lands. The cases cited by the Petitioner are in accord with this rule but all involve public lands. "Public lands" means lands which are subject to "sale or other disposal under general laws." *Northern Lumber Company v. O'Brien*, 204 U.S. 190 (1907).

The term does not include all land owned by the United States. "Land to which any claims or rights of others have attached do not fall within this designation." *Western Nuclear, Inc. v. Andrus*, 664 F.2d 234, 237 (10th Cir. 1981), citing *Payne v. Central Pacific Railway Company*, 255 U.S. 288 (1921); *Columbia Basin Land Protection Ass'n. v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981). The term "public lands" is "uniformly regarded as not including lands to which rights have attached and became vested through full compliance with applicable land law." *Payne v. Central Pacific Railway Company*, 255 U.S. 237, 238. It means "lands which are open to settlement or other disposition under the laws of the United States, and does not encompass lands in which rights of public have passed and which have become subject to the individual rights of a seller." *Hamerly v. Denton*, 359 P.2d 121 (Alas. 1961).

The County's tax liens attached prior to the Small Business Administration's acquisition by quit claim deed. The SBA acquired a title encumbered by taxes lawfully assessed and levied, and subject to prior tax sales. *State v. Salt Lake County*, 85 P.2d 851, 854 (1938). Thus, under the authority of *Payne v. Central Pacific Railway Company*, *Western Nuclear Inc. v. Andrus*, and *Columbia Basin Land Protection Ass'n. v. Schlesinger*, the subject property, when encumbered by the County's tax liens prior to the SBA ownership, is not "public land" or the "public domain." It was not subject to disposition under the general laws of the United States. The fact a patent was not issued is prima facie evidence of this premise.

The rule relied upon by Petitioner has its origin in the distribution of the public domain in the 1800's. The policy was directed to prevent adverse possession by

trespassers, as reflected in *Lindsey v. Miller's Lessee*, 31 U.S. [6 Pet.] 666 (1832).

> It is a well-settled principle, that the statute of limitations does not run against a state. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title, against the government, and all persons claiming under it. In this way, the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government." *Id.*, 31 U.S. [6 Pet.] at 672.

Even if the property had been "public domain" or "public lands," and if the United States were to have instituted this action, if it has no real interest in the case and the sole beneficiary of its action will be a private person, the defense of the statute of limitations is available, in the same manner as in suits between private parties. *United States v. Beebee*, 127 U.S. 338 (1888); *Curtner v. United States*, 149 U.S. 662 (1893).

In *Beebee*, the United States sued to set aside patents it had issued in favor of Beebee. It contended the patents were obtained through fraud and were void. The Court held that when the United States is not the real party in interest to the title or to land in controversy and the

benefit will accrue to a private party, the statute of limitations may be asserted against the United States as if it were a contest between private litigants. The Court held that the patents could not be set aside as void because the statute of limitations barred the action.

Under *Curtner*, if the suit is brought for the benefit of a third party, and the United States has no pecuniary interest in the remedy and is under no obligation to the party who will benefit, the statute of limitations is a defense.

> The government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. . . . [i]f it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use, – in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, – it can no more sustain such an action than any private person could under similar circumstances." *Id.*, 149 U.S. at 988.

The underlying policy for applying the rule on the statute of limitations as urged by Petitioner among private litigants does not exist in this case. *Public Lands*, 63A Am.Jur.2d 130.

In conclusion, there is no underlying legal or policy reason why the statute of limitations should not run in an action between private parties where the United States no longer has an interest in the property or any legal obligation to defend the title it conveyed.

The Court's ruling does not conflict with or "eviscerate" *United States v. Alabama*, 313 U.S. 274 (1940). *Alabama* is not dispositive because the SBA was not a party to this action and no longer had an interest in the property. *Shelledy v. Lore, et al.*, 836 P.2d 786. Further, *Alabama* did not involve the assertion of a grantee by quit claim deed of the right to claim the sovereign immunity of the United States as a defense to the running of the statute of limitations.

Because the defense of the statute of limitations was not before the Court, *Alabama* did not distinguish between deeds which are void on their face as opposed to deeds which are facially valid and therefore voidable. This case is limited to a unique set of facts where a grantee by quit claim deed acquired property when on notice of a rival tax deed, the expiration of the statute of limitations to challenge the validity of the deed and the rule of law that the statute will run if the deed is facially valid. *Hansen v. Morris*, 3 Utah 2d 310, 283 P.2d 884 (1955). Point III, *infra*.

B. IN THE CONTEXT OF THE FACTS, THE DECISION IS NOT IN CONFLICT WITH OTHER STATE COURT DECISIONS.

None of the cases cited by Petitioner in support of his claim to standing involve challenges to the validity of a tax deed when the statute of limitations has been raised as a defense. Further, in *Daniell v. Sherrill*, 48 So.2d 736 (Fla. 1950), the tax deed prevailed over the rival deed from the United States. The tax deed purchasers raised the defense of estoppel against the State of Florida. The

State had succeeded to the interest of the United States in property which the State had previously sold at tax sale at a time it was held by the United States. The Court held the State was estopped from asserting the invalidity of its own sale on grounds of equity and was barred by its own tax sale documents which purported to convey title to the property. Notably the statute of limitations had not been raised as a defense.

II.

IN THE CONTEXT OF THE STATUTE OF LIMITATIONS, THE COURT'S DECISION ON STANDING IS CORRECT.

A. UNDER THE FACTS AND LAW PETITIONER LACKS STANDING.

None of the cases relied on by Petitioner address the issue of standing in the context of the statute of limitations defense. Even if this Court were to find Petitioner could assert the sovereign immunity of the United States, the doctrine of sovereign immunity is not without limit. *United States v. New Mexico*, 455 U.S. 720 (1982). Under the circumstances of this case, the doctrine does not apply.

In *State and Local Taxation*, 71 Am.Jur.2d § 224, a general discussion of sovereign immunity is set forth in pertinent part as follows:

> The principle which prevents a state from levying a tax which will curtail in any substantial manner the exercise of the powers of the Federal Government has its inherent limitations. Its application must be practical and have regard for the circumstances disclosed. The end

> sought to be attained is important. The immunity is for the protection of the government, and extends no further than is necessary for that purpose. It does not extend to anything lying outside or beyond governmental functions and their exertion. It does not exist where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of the government. (Citations omitted).

Petitioner has failed to prove any direct burden on the government or influence on the exercise of the function of the government. He asserts that to deprive a grantee of property received from the United States impairs the federal government's ability to manage and dispose of its property. The fact property may be less marketable is not the burden intended to cause application of the doctrine of sovereign immunity. *Northside Canal Co. v. State Board of Equalization*, 8 F.2d 739 (D. Wyo. 1925). Further, his assertion is rebutted by the quit claim deed itself which reflects a sale for valuable consideration.

This Court has held that property purchased by a private person from the federal government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of local government, even though the prospect of taxation by the state may reduce the amount that the United States might receive from the sale of its property. *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1948).

Thus, Petitioner cannot assert a burden which was not borne by the United States as a reason to cloak him

with the sovereign immunity of the United States. The burden, if any, is remote. Because it is remote, sovereign immunity does not protect him.

The Petitioner further asserts that the statute of limitations could not commence to run while the title to the property was in the SBA and, thus, this action is not barred by the defense of the statute of limitations. As a general rule, the statute of limitations does not run against the sovereign. *Lindsey v. Miller's Lessee*, 31 U.S. [6 Pet.] 666 (1823); *Limitation of Actions*, 51 Am.Jur.2d § 409. However, where the government has no real interest in the litigation, the defense of the statute of limitations is available the same as if the litigation were between individuals. *United States v. Beebee; Curtner v. United States; Limitation of Actions*, 51 Am.Jur.2d § 410. Thus, even if the United States were a nominal party and this action had been brought in its name, if the United States has no real interest in the litigation and the benefit to come from the litigation will inure to the benefit of an individual such as Petitioner, the statute of limitations may be asserted as a defense to the suit. *McNutt v. Cox*, 129 S.W.2d 626 (Tex. 1939); *Limitation of Actions*, 51 Am.Jur.2d § 410.

Petitioner has failed to cite any cases which support his position that the statute of limitations is not a valid bar to his claim even though the grantor was the United States. The Petitioner, and not the United States, is the real party in interest. A real party in interest is one who has the right to control and receive the fruits of the litigation. *Preston v. Iron County*, 105 Wis.2d 346, 314 N.W.2d 131 (Wis. App. 1981). If Petitioner prevails, the tax deed issued by Salt Lake County will be set aside and title quieted in himself. Under such circumstances, the

fact the United States may have been in the chain of title does not affect the running of the statute of limitations as it applies to the Petitioner's claim.

B. THE TENTH CIRCUIT'S DECISION IS PERSUASIVE AUTHORITY.

Interpreting the Utah statute before this Court and the decisions of the Utah Supreme Court interpreting it, the Court of Appeals in *Kemmerer Coal Co. v. Brigham Young University*, 723 F.2d 54 (10th Cir. 1983), considered the standing of a grantee to assert the constitutional violation of its grantor in order to set aside a rival tax deed, where the statute of limitations had been raised as a defense. The court held Kemmerer Coal Company had no standing to assert the violation of the constitutional rights of its grantor as a basis to void a tax sale otherwise barred for lack of timeliness by the statute of limitations.

It asserted that the due process rights of its grantor, San Rafael, had been violated by the County because it received no notice of the tax assessment and received only publication notice of the sale of the coal rights. This notice listed strangers to the title as owners. The court acknowledged that San Rafael's constitutional right to due process may have been violated by Emery County. Kemmerer asserted that the statute of limitations did not bar the due process attack on the title derived from the tax deed because the tax title was void because of the due

process violation. The court rejected that argument and stated its reasoning as follows:

> . . . Kemmerer itself has suffered no due process injury. If a constitutional violation occurred, it was the taking of San Rafael's property without due process. Kemmerer thus seeks to advance its claim by asserting a third-party's constitutional rights. "[T]he general rule is that a litigant may only assert his own constitutional rights or immunities." (citations omitted)
>
> * * *
>
> We believe the Utah Supreme Court would hold that Kemmerer has no standing to assert a third-party's constitutional rights under the facts of this case. While it may have been "repugnant to fundamental fairness," *Frederiksen*, 632 P.2d at 831 n. 14, to deprive San Rafael of its property without proper notice, we do not believe it fundamentally unfair to apply the statute of limitations to Kemmerer who bought the coal lands in the face of record notice of a rival claim to "underground rights." 723 F.2d at 57-58.

Similarly, it is not fundamentally unfair or in excess of constitutional permissibility to apply the statute of limitations to bar Petitioner's quiet title action when he asserts an immunity solely that of the United States, while on notice of a rival claim due to a 1984 tax deed and the expiration of the statute of limitations.

C. PETITIONER'S ACTION IS NOT WITHIN THE EXCEPTION TO THIRD PARTY STANDING DOCTRINE.

The Utah Supreme Court correctly held Petitioner did not come within the exception to the third party standing doctrine. He asserts injury to the United States in that it will not be able to manage or dispose of its property in light of the Utah Supreme Court's decision.

First, Petitioner failed to show a substantial relationship between himself and the SBA. His interest is founded upon a quit claim deed from the SBA, which founded its interest on a quit claim deed encumbered by tax liens. "Such deeds do not imply the conveyance of any particular interest in the property. . . . Plaintiffs acquired only the interest of their grantors, be that interest what it may." *Nix v. Tooele County*, 118 P.2d 376, 377 (Utah 1941). The SBA did not warrant title. Had it done so, perhaps such a relationship would exist.

As to the second requirement of jus tertii, the SBA could have asserted its rights by merely intervening in the proceedings before the trial court or could have provided evidence as to the economic burden. But there is no evidence in the record of economic burden on the United States. The SBA had a buyer willing to pay valuable consideration notwithstanding notice of the rival tax deed and the passage of the state statute of limitations.

Thirdly, there is no dilution of the SBA's rights. The quit claim deed is the only evidence of the transaction between it and Petitioner. It is proof the SBA received full and valuable consideration as a grantor. In the context of the statute of limitations defense, the United States is not

the real party in interest and the statute should run as it should in litigation between private parties.

III.

PETITIONER FAILS TO DISTINGUISH BETWEEN DEEDS VOID ON THEIR FACE AND DEEDS WHICH ARE VOIDABLE.

The statute of limitations will run against deeds which are facially valid but will not run if the deed is void on its face. Petitioner has never contended that the 1984 tax deed was void on its face. He claims the deed is void because the SBA's interest in the property removed the property from the County's taxing jurisdiction. His argument is that any sale of the property for taxes would be void; if a tax sale is void, the statute of limitations will not run. However, his contention is not supported by the authorities he relies upon and is not the law in Utah.

Petitioner contends that *Hansen v. Morris*, 3 Utah 2d 310, 283 P.2d 884 (1955), supports his argument that the statute of limitations will not run if a deed is void for lack of jurisdiction. In *Hansen v. Morris*, the Court held that the statute of limitations will not run if the deed is *void on its face*. It also held that the statute will run if the tax deed is valid on its face and issued by the proper governmental authority:

> In passing, we do not wish it understood that our decision is applicable to conveyances void on their face, such as those containing no grantor, grantee, description, etc., or to those that may be forged or the like, *but only to those valid on their face, as here, and executed by the same authority that could have passed good title* if each

> and every statutory step in perfecting a tax title had been followed, without the aid of limitations statute. (Emphasis added.) 283 P.2d at 887.

None of the cases cited in the footnote to the quote address the issue raised by Petitioner and the statute of limitations was held in each case to bar the action. *Jones v. Russell*, 194 So. 290 (Miss. 1940) (two year statute of limitations is intended to cut off inquiry into the merits of the validity of the tax sale); *Strauss v. Thompson*, 71 P.2d 994 (Okla. 1935) (action to cancel tax deed which was not void on its face is barred by the one year statute of limitations); *Eagles v. General Electric Company*, 104 P.2d 912 (Wash. 1940) (the statute of limitations will run even though a deed is void).

Further, *Baxter v. Utah Department of Transportation*, 783 P.2d 1045 (Ut. App. 1989), does not support his position either. In *Baxter*, the issue before the Court was whether the property which had been sold at tax sale was situated in Davis or Weber County. It was contended that the tax deed from Davis County was void because the property was located in Weber County and as a result Davis County "had no authority to tax the property, to acquire title when taxes were unpaid, or to convey title through a tax deed." *Baxter*, 783 P.2d 1045, 1047. Davis County could not convey a valid title through tax sale to property situated in another county.

Petitioner is correct in his assertion "the statute of limitations is without application to void deeds." Vol. 5B Thompson, *Real Property*, § 2766 (1978). The above quote is footnoted with reference to several cases. Those cases reveal that the scope of the assertion is primarily limited to deeds void on their face. *Pierce v. Barrett*, 220 P. 652

(Okla. 1923); *Adams v. Mottley*, 223 P. 356 (Okla. 1924) (tax deed defective on its face is not sufficient to set statute of limitations in operation); *Loper v. E. W. Gates Lbr. Co.*, 98 So. 722 (Ala. 1923) (statute of limitations inapplicable to tax sale where owner paid taxes before sale); *Goodrich v. Darr*, 256 S.W. 868 (Ark. 1923) (tax deed void due to defect on face of deed; hence, statute of limitations does not run); *Harang v. Gheens Realty Co.*, 155 La., 98 So. 760 (La. 1923) (statute of limitations does not run against tax deeds which did not include property within tax deed description).

Petitioner also refers to P. Lear, *Utah's Short Statutes of Limitations for Tax Titles: The Continuing Specter of Lyman v. National Mortgage Bond Corp., – A Need for Remedial Legislation*, 76 BYU L. Rev. 457, 467 (1976) for authority that where a deed is void due to jurisdictional defect, the statute of limitations favoring tax deeds do not run. Petitioner has misinterpreted Lear's statement which is set forth in pertinent part as follows:

> Special or short statutes of limitation do not run where the tax deed is absolutely void on its face – not merely voidable – due to some jurisdictional defect or where the jurisdictional defect, not apparent on the face of the deed, entails an irregularity in the proceedings . . .
>
> . . . In most states, however, where the deed is valid on its face and is voidable merely for some irregularity in the proceedings, the limiting statute runs from the date of execution and delivery of the deed or, in some cases, from the date of recording, regardless of possession. P. Lear, *Ibid.*, p. 468.

Reliance on *Redfield v. Parks*, 132 U.S. 239 (1889), is also misplaced. The Court found the deed to be *void on its face* because it was sold at tax sale on a different date than that recorded on the face of the deed. Thus, the general rule applies that the statute will run, but it is not authority on the issues before the Court.

In summary, the statute of limitations will run if the deed is facially valid, even though the deed is voidable due to a jurisdictional defect such as alleged by Petitioner. The Utah Supreme Court specifically adopted this rule in *Hansen v. Morris*, 283 P.2d 884 and in *Frederiksen v. LaFluer*, 632 P.2d 827 (Utah 1981), when it held that the statute of limitations would bar a challenge to the tax deed even though the tax deed was invalid.

In conclusion, neither *Hansen v. Morris*, *Baxter v. Utah Department of Transporation*, nor the scholarly authorities support the Petitioner's argument the deed is void. The deed is valid on its face and issued by Salt Lake County, which had jurisdiction over the subject property and therefore the statute of limitations will run.

IV.

THE RECORD DOES NOT SUPPORT PETITIONER'S ASSERTION OF IMPERMISSIBLE BURDEN ON THE UNITED STATES OR A LOSS OF FEDERAL ASSETS.

The decision of the Utah Supreme Court applies only to this specific fact situation. No evidence of economic burden was presented by Petitioner. Rather, the only evidence in the record is the quit claim deed and it directly rebuts Petitioner's assertion of economic burden.

It is evidence the SBA sold the property for valuable consideration and represents no loss of federal assets.

CONCLUSION

For the foregoing reasons, respondent requests the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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